



May 8, 2019

Via US Mail, Certified

Rex Sutter  
Modesto Plating  
436 Mitchell Road Suite D  
Modesto, CA 95354

**Re: 60-Day Notice of Violations and Intent to File Suit Under the Federal Water Pollution Control Act ("Clean Water Act")**

To Officers, Directors, Operators, Property Owners and/or Facility Managers of Modesto Plating.

This letter is being sent to you on behalf of Aquatic Quality United Association ("AQUA") to give legal notice that AQUA intends to file a civil action against Modesto Plating ("Discharger") for violations of the Federal Clean Water Act ("CWA" or "Act") 33 U.S.C. § 1251 *et seq.*, that AQUA believes are occurring at the Modesto Plating facility located at 436 Mitchell Road Suite D in Modesto, California ("the Facility" or "the site").

AQUA is an environmental citizen's group established in the State of California as an unincorporated association. AQUA's mission is to protect, enhance, and assist in the restoration of all rivers, creeks, streams, wetlands, vernal pools, and tributaries of California, for the benefit of its ecosystems and communities.

As discussed below, the Facility's discharges of pollutants degrade water quality and harm aquatic life in the Facility's Receiving Waters, which are waters of the United States and described in Section II.B, below. AQUA has members throughout northern California. Some of AQUA's members live, work, and/or recreate near the Receiving Waters and use and enjoy the Receiving Waters for surfing, kayaking, camping, fishing, boating, swimming, hiking, cycling, bird watching, picnicking, viewing wildlife, and/or engaging in scientific study.

At least one of AQUA's current members has standing to bring suit against Modesto Plating, as the unlawful discharge of pollutants from the Facility as alleged herein has had an adverse effect particular to him or her and has resulted in actual harm to the specific AQUA member(s).

Further, the Facility's discharges of polluted storm water and non-storm water are ongoing and continuous. As a result, the interests of certain individual AQUA members have been, are being, and will continue to be adversely affected by the failure of Modesto Plating to comply with the General Permit and the Clean Water Act.

CWA section 505(b) requires that sixty (60) days prior to the initiation of a civil action under CWA section 505(a), a citizen must give notice of intent to file suit. 33 U.S.C. § 1365(b). Notice must be given to the alleged violator, the U.S. Environmental Protection Agency ("EPA"), and the State in which the violations occur.

As required by CWA section 505(b), this Notice of Violation and Intent to File Suit provides notice to the Discharger of the violations which have occurred and continue to occur at the Facility. After the expiration of sixty (60) days from the date of this Notice of Violation and Intent to File Suit, AQUA intends to file suit in federal court against the Discharger under CWA section 505(a) for the violations described more fully below.

## **I. THE SPECIFIC STANDARD, LIMITATION, OR ORDER VIOLATED**

AQUA's investigation of the Facility has uncovered significant, ongoing, and continuous violations of the CWA and the General Industrial Storm Water Permit issued by the State of California (NPDES General Permit No. CAS000001 [State Water Resources Control Board ("SWRCB")]) Water Quality Order No. 92-12-DWQ, as amended by Order No. 97-03-DWQ ("1997 Permit") and by Order No. 2014-0057-DWQ ("2015 Permit") (collectively, the "General Permit").

Information available to AQUA, including documents obtained from California EPA's online Storm Water Multiple Application and Reporting Tracking System ("SMARTS"), indicates that on or around July 20, 2015, Modesto Plating submitted a Notice of Intent ("NOI") to be authorized to discharge storm water from the Facility under the 2015 Permit. Modesto Plating's assigned Waste Discharger Identification number ("WDID") is 5S501025860.

As more fully described in Section III, below, AQUA alleges that in its operations of the Facility, Modesto Plating has committed ongoing violations of the substantive and procedural requirements of the Federal Clean Water Act, California Water Code §13377, the General Permit, the Regional Water Board Basin Plan, the California Toxics Rule (CTR) 40 C.F.R. § 131.38, and California Code of Regulations, Title 22, § 64431.

## **II. THE LOCATION OF THE ALLEGED VIOLATIONS**

### **A. The Facility**

The location of the point sources from which the pollutants identified in this Notice are discharged in violation of the CWA is Modesto Plating's permanent facility address of 436 Mitchell Road Suite D in Modesto, California.

1296 E Gibson Road #A-125  
Woodland, CA 95776

Telephone: (530) 302-5293  
Email: [aquaticquality@gmail.com](mailto:aquaticquality@gmail.com)

Modesto Plating Facility is an establishment engaged in powder coating and other similar applications. Facility operations are covered under Standard Industrial Classification Code (SIC) 3471-Electroplating, Plating, Polishing, Anodizing, and Coloring

Based on the EPA's Industrial Storm Water Fact Sheet for Sector AA – Fabricated Metal Products, polluted discharges from operations at the Facility contain galvanized metals such as zinc, nickel and chromium; heavy metals, such as iron, copper and aluminum; toxic metals, such as lead and cadmium; total suspended solids ("TSS"); chemical oxygen demand (COD); biochemical oxygen demand (BOD); nitrates and nitrites; phosphates; chlorinated solvents; and oil and grease ("O&G"). Many of these pollutants are on the list of chemicals published by the State of California as known to cause cancer, birth defects, and/or developmental or reproductive harm.

Information available to AQUA indicates that the Facility's industrial activities and associated materials are exposed to storm water, and that each of the substances listed on the EPA's Industrial Storm Water Fact Sheet is a potential source of pollutants at the Facility.

#### **B. The Affected Receiving Waters**

The Facility discharges into a municipal storm drain system, which then discharges to the Tuolumne River, a tributary of the San Joaquin River ("Receiving Waters").

The San Joaquin River is a water of the United States. The CWA requires that water bodies such as the Sacramento River meet water quality objectives that protect specific "beneficial uses." The Central Valley Regional Water Board has issued its *Water Quality Control Plan for the Sacramento and San Joaquin River Basins* ("Basin Plan") to delineate those water quality objectives.

The Basin Plan identifies the "Beneficial Uses" of water bodies in the region. The Beneficial Uses for the Receiving Waters downstream of the Facility include: Municipal and Domestic Supply (MUN), Agricultural Supply (AGR), Industrial Process Supply (PRO), Industrial Service Supply (IND), Navigation (NAV), Water Contact Recreation (REC-1), Non-contact Water Recreation (REC-2), Warm Freshwater Habitat (WARM), Cold Freshwater Habitat (COLD), Wildlife Habitat (WILD), Migration (MIGR), and Spawning, Reproduction, and/or Early Development (SPWN).

A water body is impaired pursuant to section 303(d) of the Clean Water Act, 33 U.S.C. § 1313(d), when its Beneficial Uses are not being achieved due to the presence of one or more pollutants.

The San Joaquin River is impaired for Selenium, Salinity, Total Dissolved Solids (TDS), Electrical Conductivity (EC), Boron, Organophosphorus (OP) Pesticides (Diazinon, Chlorpyrifos), Oxygen-Demanding Substances (BOD/Algae, Ammonia, Organic N) Organochlorine "Legacy" Pesticides (DDT, Chlordane, Dieldrin, Toxaphene, etc.) Mercury, Pathogen-Indicator Organisms, E. coli, Fecal Coliforms, and Toxicity of Unknown Cause.

Polluted storm water and non-storm water discharges from industrial facilities, such as the Facility, contribute to the further degradation of already impaired surface waters, and harm aquatic dependent wildlife.

### **III. VIOLATIONS OF THE CLEAN WATER ACT AND GENERAL PERMIT**

#### **A. Deficient/Invalid SWPPP and Site Map**

Modesto Plating's current Storm Water Pollution Prevention Plan ("SWPPP") and Site Map for the Facility are both inadequate and fail(s) to comply with the requirements of the General Permit as specified in Section X of Order No. 2014-0057-DWQ, as follows:

- (a) The Site Map does not include the minimum required components for Site Maps as indicated in Section X.E of the General Permit. Specifically, the Site Map fails to include the following:
  - 1) areas of soil erosion;
  - 2) nearby water bodies such as rivers, lakes and creeks;
  - 3) locations and descriptions of structural control measures that affect industrial storm water discharges, authorized NSWDs and/or run-on;
  - 4) identification of all impervious areas of the facility, including paved areas, buildings, covered storage areas or other roofed structures;
  - 5) locations where materials are directly exposed to precipitation and the locations where identified significant spills or leaks have occurred;
  - 6) all areas of industrial activity subject to the General Permit.
- (b) The SWPPP fails to include an appropriate discussion of the Industrial Materials handled at the facility (Section X.F);
- (c) The SWPPP is invalid because it was not certified and submitted by the Facility's Legally Responsible Person. In fact, the SWPPP was not certified by anyone. Pursuant to Section XII.K of the General Permit, all Permit Registration Documents (PRDs), including SWPPPs, must be certified and submitted by the Facility's authorized Legally Responsible Person;

Failure to develop or implement an adequate SWPPP is a violation of Sections II.B.4.f and X of the General Permit.

#### **B. Failure to Develop, Implement and/or Revise an Adequate Monitoring and Reporting Program Pursuant to the General Permit**

Section XI of the General Permit requires Dischargers to develop and implement a storm water monitoring and reporting program ("M&RP") prior to conducting industrial activities. Dischargers have an ongoing obligation to revise the M&RP as necessary to ensure compliance with the General Permit.

The objective of the M&RP is to detect and measure the concentrations of pollutants in a facility's discharge, and to ensure compliance with the General Permit's Discharge Prohibitions, Effluent Limitations, and Receiving Water Limitations. An adequate M&RP ensures that BMPs are effectively reducing and/or eliminating pollutants at the Facility, and it must be evaluated and revised whenever appropriate to ensure compliance with the General Permit.

1. Failure to Conduct Visual Observations

Section XI(A) of the General Permit requires all Dischargers to conduct visual observations at least once each month, and sampling observations at the same time sampling occurs at a discharge location.

Observations must document the presence of any floating and suspended material, oil and grease, discolorations, turbidity, odor and the source of any pollutants. Dischargers must document and maintain records of observations, observation dates, locations observed, and responses taken to reduce or prevent pollutants in storm water discharges.

EDEN believes that between July 20, 2015, and the present, Modesto Plating has failed to conduct monthly and sampling visual observations pursuant to Section XI(A) of the General Permit.

2. Failure to Collect and Analyze the Required Number of Storm Water Samples

In addition, EDEN alleges that Modesto Plating has failed to provide the Regional Water Board with the minimum number of annual documented results of Facility run-off sampling as required under Sections XI.B.2 and XI.B.11.a of Order No. 2014-0057-DWQ, in violation of the General Permit and the CWA.

Section XI.B.2 of the General Permit requires that all Dischargers collect and analyze storm water samples from two Qualifying Storm Events ("QSEs") within the first half of each reporting year (July 1 to December 31), and two (2) QSEs within the second half of each reporting year (January 1 to June 30).

Section XI.C.6.b provides that if samples are not collected pursuant to the General Permit, an explanation must be included in the Annual Report.

As of the date of this Notice, Modesto Plating has failed to upload into the SMARTS database system *any* storm water sample analyses for samples collected during the reporting years 2015-16, 2016-17, 2017-18 and 2018-19 to date.

**C. Falsification of Annual Reports Submitted to the Regional Water Board**

Section XXI.L of the General Permit provides as follows:

**L. Certification**

Any person signing, certifying, and submitting documents under Section XXI.K above shall make the following certification:

"I certify under penalty of law that this document and all Attachments were prepared under my direction or supervision in accordance with a system designed to assure that qualified personnel properly gather and evaluate the information submitted. Based on my inquiry of the person or persons who manage the system or those persons directly responsible for gathering the information, to the best of my knowledge and belief, the information submitted is, true, accurate, and complete. I am aware that there are significant penalties for submitting false information, including the possibility of fine and imprisonment for knowing violations."

Further, Section XXI.N of the General Permit provides as follows:

**N. Penalties for Falsification of Reports**

Clean Water Act section 309(c)(4) provides that any person that knowingly makes any false material statement, representation, or certification in any record or other document submitted or required to be maintained under this General Permit, including reports of compliance or noncompliance shall upon conviction, be punished by a fine of not more than \$10,000 or by imprisonment for not more than two years or by both.

On June 19, 2018 and January 17, 2019, Modesto Plating submitted its Annual Reports for the Fiscal Years 2017-18 and 2018-19. Mr. Rex Sutter signed the Reports under penalty of law. Mr. Sutter is the current Legally Responsible Person ("LRP") for Modesto Plating.

The Annual Report for June 19, 2018 included Attachment 1 as an explanation for why Modesto Plating failed to sample the required number of Qualifying Storm Events during the reporting year for all discharge locations, in accordance with Section XI.B. Mr. Sutter certified in the Reports, under penalty of perjury, that the required number of samples were not collected by the Facility because allegedly there were insufficient qualifying storm water discharges during the reporting years and scheduled facility operating hours.

However, records from the National Oceanic and Atmospheric Administration (NOAA) website/database confirm that during the reporting years in question there were in fact sufficient Qualified Storm Events (QSEs) occurring near the Facility during or within 12 hours of the start of regular business hours to allow Modesto Plating to collect the requisite number of samples.

On January 17, 2019 Mr. Sutter responded "Yes" to Question No. 3 on the Annual Reports ("Did you sample the required number of Qualifying Storm Events during the reporting year for all discharge locations, in accordance with Section XI.B?") However, as discussed

above, Modesto Plating failed to collect and analyze the required number of storm water samples during the reporting years in question.

**D. Deficient BMP Implementation**

Sections I.C, V.A and X.C.1.b of the General Permit require Dischargers to identify and implement minimum and advanced Best Management Practices ("BMPs") that comply with the Best Available Technology ("BAT") and Best Conventional Pollutant Control Technology ("BCT") requirements of the General Permit to reduce or prevent discharges of pollutants in their storm water discharge in a manner that reflects best industry practice, considering technological availability and economic practicability and achievability.

EDEN alleges that Modesto Plating has been conducting industrial activities at the site without adequate BMPs to prevent resulting non-storm water discharges. Non-storm water discharges resulting from these activities are not from sources that are listed among the authorized non-storm water discharges in the General Permit, and thus are always prohibited.

Modesto Plating's failure to develop and/or implement adequate BMPs and pollution controls to meet BAT and BCT at the Facility violates and will continue to violate the CWA and the Industrial General Permit each day the Facility discharges storm water without meeting BAT and BCT.

**Specific BMP Deficiencies**

On September 16, 2015, the Facility was inspected by Rich Muhl of the Regional Water Quality Control Board. During that inspection, Mr. Muhl noted that there was excessive tracking as a result of delivery vehicles from the neighboring concrete batch plant. Mr. Muhl also noted that there was insufficient BMPs installed near the second sampling location.

**E. Discharges In Violation of the General Permit**

Except as authorized by Special Conditions of the General Permit, Discharge Prohibition III(B) prohibits permittees from discharging materials other than storm water (non-storm water discharges) either directly or indirectly to waters of the United States. Unauthorized non-storm water discharges must be either eliminated or permitted by a separate NPDES permit.

Information available to EDEN indicates that unauthorized non-storm water discharges occur at the Facility due to inadequate BMP development and/or implementation necessary to prevent these discharges.

EDEN alleges that the Discharger has discharged storm water containing excessive levels of pollutants from the Facility to its Receiving Waters during at least every significant local rain event over 0.1 inches in the last five (5) years.

EDEN hereby puts the Discharger on notice that each time the Facility discharges prohibited non-storm water in violation of Discharge Prohibition III.B of the General Permit is a

separate and distinct violation of the General Permit and Section 301(a) of the Clean Water Act, 33 U.S.C. § 1311(a).

**F. Failure to Comply with the Mandates of the Regional Water Board**

Pursuant to Section XIX of the General Permit, Regional Water Boards have general authority to enforce the provisions and requirements of the General Permit, including reviewing SWPPPs, Monitoring Implementation Plans, ERA Reports, and Annual Reports and requiring Dischargers to revise and re-submit PRDs, conducting compliance inspections, and taking enforcement actions.

On February 21, 2018, Mike Fischer of the Central Valley Regional Water Quality Control Board sent an email requiring the Facility to sample the roof downspouts.

Modesto Plating has failed to comply with this mandate as of the date of this Notice.

**G. Failure to Comply with Facility SWPPP**

Section 4 of the Facility SWPPP indicates that the Facility will collect and analyze storm water samples from two qualified storm events within the first half of each reporting year (July 1 to December 31) and two QSEs within the second half of each reporting year (January 1 to June 30).

As detailed above, the Facility missed collecting storm water samples from all reporting years to date.

Modesto Plating may have had other violations that can only be fully identified and documented once discovery and investigation have been completed. Hence, to the extent possible, EDEN includes such violations in this Notice and reserves the right to amend this Notice, if necessary, to include such further violations in future legal proceedings.

The violations discussed herein are derived from eye witness reports and records publicly available. These violations are continuing.

**IV. THE PERSON OR PERSONS RESPONSIBLE FOR THE VIOLATIONS**

The entities responsible for the alleged violations are Modesto Plating, as well as employees of the Facility responsible for compliance with the CWA.

**V. THE DATE, DATES, OR REASONABLE RANGE OF DATES OF THE VIOLATIONS**

The range of dates covered by this 60-day Notice is from at least July 20, 2015, to the date of this Notice. AQUA may from time to time update this Notice to include all violations which

may occur after the range of dates covered by this Notice. Some of the violations are continuous in nature; therefore, each day constitutes a violation.

#### VI. CONTACT INFORMATION

The entity giving this 60-day Notice is Aquatic Quality United Association ("AQUA").

Mika P. Tolson  
Aquatic Quality United Association  
1296 E. Gibson Road #A-125  
Woodland, CA 95776  
Telephone: (530) 302-5293  
Email: [aquaticquality@gmail.com](mailto:aquaticquality@gmail.com) (emailed correspondence is preferred)

AQUA will be retaining counsel to represent it in this matter. Please contact AQUA at the email address listed above within twenty (20) days of the date of this Notice to be provided with the name and contact information of the attorney assigned to represent AQUA in this matter.

#### VII. RELIEF SOUGHT FOR VIOLATIONS OF THE CLEAN WATER ACT

CWA §§ 505(a)(1) and 505(f) provide for citizen enforcement actions against any "person," including individuals, corporations, or partnerships, for violations of NPDES permit requirements and for un-permitted discharges of pollutants. 33 U.S.C. §§ 1365(a)(1) and (f), §1362(5).

Pursuant to Section 309(d) of the Clean Water Act, 33 U.S.C. § 1319(d), and the Adjustment of Civil Monetary Penalties for Inflation, 40 C.F.R. § 19.4, each separate violation of the Clean Water Act subjects the violator to a penalty for all violations occurring during the period commencing five (5) years prior to the date of the Notice Letter. These provisions of law authorize civil penalties of \$37,500.00 per day per violation for all Clean Water Act violations after January 12, 2009, and \$51,570.00 per day per violation for violations that occurred after November 2, 2015.

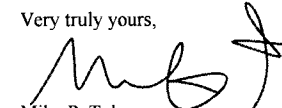
In addition to civil penalties, AQUA will seek injunctive relief preventing further violations of the Clean Water Act pursuant to Sections 505(a) and (d), 33 U.S.C. § 1365(a) and (d), declaratory relief, and such other relief as permitted by law. Lastly, pursuant to Section 505(d) of the Clean Water Act, 33 U.S.C. § 1365(d), AQUA will seek to recover its litigation costs, including attorneys' and experts' fees.

#### VIII. CONCLUSION

The CWA specifically provides a 60-day notice period to promote resolution of disputes. During the 60-day notice period, AQUA is willing to discuss effective remedies for the violations; however, if Modesto Plating wishes to pursue such discussions in the absence of litigation, it is

suggested those discussions be initiated soon so that they may be completed before the end of the 60-day notice period. AQUA reserves the right to file a lawsuit if discussions are continuing when the notice period ends.

Very truly yours,



Mika P. Tolson  
President

Copies to:

Administrator, U.S. Environmental Protection Agency  
Executive Director, State Water Resources Control Board  
Regional Administrator, U.S. EPA - Region 9